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Supreme Court, U.S.
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In The

Supreme Court of the United States

KEVIN WEDDERBURN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For a Writ of Certiorari to The
United States Court of Appeals for
the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 8 U.S.C. § 1432, which conditions citizenship for the child of a naturalized citizen upon the parent's gender, the child's illegitimacy, and the parent's marital status, violate the Equal Protection guarantee of the Fifth Amendment?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Kevin Wedderburn, and the Respondent, the Immigration and Naturalization Service.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Factual Background 3

B. Proceedings Below 4

REASONS FOR GRANTING THE WRIT 8

I. THIS CASE RAISES IMPORTANT QUESTIONS THAT ARE CURRENTLY PENDING BEFORE THE COURT IN ANOTHER CASE 9

A. Gender Discrimination in Citizenship Statutes 9

B. Standing 12

II. THIS CASE ALSO RAISES AN IMPORTANT QUESTION OF WHETHER CITIZENSHIP MAY BE CONDITIONED ON A CHILD'S LEGITIMACY OR THE MARRIAGE OF HIS PARENTS 14

A. Section 1432(a)(3)'s Legitimacy-Related Distinctions and the Proper Standard of Review 14

B. Widespread Changes In The Law of Legitimation 17

III. A REMEDY FOR THE STATUTE'S INVALIDITY IS AVAILABLE 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Breyer v. Meissner, 214 F.3d 416 (3d Cir. 2000) 11

Califano v. Westcott, 443 U.S. 76 (1979) 19

Clark v. Jeter, 486 U.S. 456 (1988) 14, 16

Fiallo v. Bell, 430 U.S. 787 (1977) 11

Johnson v. Robison, 415 U.S. 361 (1974) 5

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 9

Lake v. Reno, 226 F.3d 141 (2nd Cir. 2000) 9, 11

Levy v. Louisiana, 391 U.S. 68 (1968) 16

Matter of Rivers, 17 I. & N. Dec. 419 (BIA 1980) 19

Miller v. Albright, 523 U.S. 420 (1998) ..... passim

Mississippi University for Women v. Hogan,
458 U.S. 718 (1982) 15

Nguyen v. Immigration and Naturalization Service,
208 F.3d 528 (5th Cir. 2000), *petition for cert granted*,
__*U.S.*__, 69 U.S.L.W. 3191 (Sept. 26, 2000) . passim

Powers v. Ohio, 499 U.S. 400 (1991) 12, 13

Terrell v. Immigration & Naturalization Service,
157 F.3d 806 (10th Cir. 1998) 9

Trimble v. Gordon, 430 U.S. 762 (1977) 7, 16, 17

United States v. Ahumada-Aguilar, 189 F.3d 1121
(9th Cir. 1999), *petition for cert. filed*,
__U.S.__, 68 U.S.L.W. 3741 (May 22, 2000) . . 9, 11

Wedderburn v. Immigration and Naturalization Service,
215 F.3d 795 (7th Cir. 2000) . . . . . passim

Welsh v. United States, 398 U.S. 333 (1970) 19

STATUTES AND REGULATIONS

U.S. Const. amend. V 2

Child Citizenship Act, Pub. L. No. 106-395; 114 Stat. 1631 (October 30, 2000)(to be codified at 8. U.S.C. § 1431) 19, 20

8 U.S.C. § 1101(c) 15, 17

8 U.S.C. § 1103 5

8 U.S.C. § 1401 10

8 U.S.C. § 1409 ..... 9, 10, 11, 12, 13

8 U.S.C. § 1432 ..... passim

8 U.S.C. § 1433 7

28 U.S.C. § 1254(1) 2

8 C.F.R. § 240.1(a) 5

8 C.F.R. § 341.6 5

8 C.F.R. § 103.3(a) 5

MISCELLANEOUS

C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law & Procedure*, § 98.03(2) (1999) 20

N. Johnson, *Recent Developments: The Breadth of Family Law Review Under the European Convention on Human Rights*, 36 HARV. INT'L L.J. 513 (1995) .. 17

Comment, *The Effects of Intercountry Adoptions on Biological Parents' Rights*, 22 LOYOLA L.A. INT'L & COMP. L.REV. 251 (1999) 17

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On Petition For a Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevin Wedderburn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 2a - 14a)is reported at 215 F.3d 795 (7th Cir. 2000). The opinion of the Board of Immigration Appeals (App. 15a-20a) is unreported. The deportation order of the Immigration Judge (App. 21a) is unreported.

Two other relevant decisions were made in this case by the Immigration and Naturalization Service ("INS"). The INS' initial decision denying Kevin Wedderburn's application for a Certificate of Citizenship is found at App. 27a-30a. The decision of the INS' Administrative Appeals Unit, affirming this decision, is found at App. 22a-26a.

STATEMENT OF JURISDICTION

The decision and judgment of the court of appeals was issued on June 1, 2000. The decision denying the petition for rehearing and suggestion for rehearing en banc was issued on August 31, 2000. (App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. 8 U.S.C. § 1432, Section 321 of the Immigration and Nationality Act (INA), Sec. 14, Act of Nov. 14, 1986, provides, in pertinent part:

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while such child is under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this section, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

STATEMENT OF THE CASE

A. Factual Background

Kevin Wedderburn was born in Jamaica on October 30, 1975, the son of Fitzroy Wedderburn and Julie Hines. *Wedderburn v. Immigration and Naturalization Service*, 215 F.3d 795, 797 (7th Cir. 2000) (App. 3a). At the time of Kevin's birth, Julie Hines and Fitzroy Wedderburn were citizens and nationals of Jamaica. *Id.* They were not married when Kevin was born, nor did they ever marry. *Id.* Kevin never lived with his mother; he was raised by his maternal grandmother until he was eleven years old. *Id.* at 798 (App. 5a - 6a).

After Kevin's birth, Fitzroy Wedderburn came to the United States and later married Velma Hyacinth Wedderburn. *Id.* at 797 (App. 3a). On the basis of that marriage, Fitzroy and

Velma Wedderburn began the process of bringing Kevin to the United States as a lawful permanent resident. *Id.* Julie Hines was aware of their efforts. (App. 31a.) In 1982, when Kevin was seven years old, she notified the INS in New York -- Fitzroy's residence -- that Fitzroy Wedderburn was Kevin's father and that she intended to relinquish custody of Kevin to his father and stepmother in the United States. *Id.*

Fitzroy Wedderburn legitimated his son under the laws of Jamaica when Kevin was ten years old. *Id.* On October 9, 1987, at the age of eleven, Kevin was admitted into the United States as a lawful permanent resident based upon the immediate relative petition filed on his behalf by his stepmother and his father. *Id.* (App. 3a - 4a). Kevin joined Fitzroy and Velma Wedderburn in New York, and lived with them there. *Id.* Some years later, Fitzroy and Velma allowed Kevin to go Illinois to live with his paternal grandmother. *Id.*

On June 2, 1993, when Kevin was seventeen years old, Fitzroy Wedderburn became a naturalized citizen of the United States. *Id.* at 796 (App. 3a).

In 1995, Kevin was convicted of aggravated criminal sexual assault, and sentenced to a term of six years' imprisonment. *Id.* After Kevin completed his sentence, he was immediately taken into the custody of the INS and has remained in INS custody since that time. (App. 32a-33a.)

B. Proceedings Below

The INS commenced deportation proceedings against Kevin while he was still incarcerated. (App. 17a.) Kevin defended on the ground that he was not an alien, because he had become a United States citizen automatically on June 2, 1993, the day his father naturalized. *Id.*

Kevin made this claim under 8 U.S.C. § 1432. Section 1432 confers automatic citizenship upon minor children of naturalized United States citizens, if the naturalization occurs before the child turns eighteen and while the child is a legal resident of the United States. (App. 17a-18a.) Because an immigration judge cannot adjudicate a claim of automatic citizenship under 8 U.S.C. § 1432 (*see* 8 C.F.R. § 240.1(a)), the immigration judge held Kevin's deportation proceedings in abeyance so Kevin could file an application for a Certificate of Citizenship based on his claim that under 8 U.S.C. § 1432, he derived citizenship through his father in 1993. (App. 17a-18a.) If the INS recognized Kevin's automatic citizenship claim through his father, the deportation proceedings would be terminated as Kevin would not be an alien and could not be deported.

On March 3, 1998, the INS issued a written decision denying Kevin's claim to automatic citizenship. (App. 22a.) The INS denied the application because "[§ 1432] only allows for the acquisition of U.S. citizenship through the mother for children born out of wedlock." (App. 30a-31a.)

Kevin Wedderburn appealed that decision to the INS Office of Administrative Appeals in Washington, D.C. (App. 23a.) On August 13, 1998, the INS dismissed his appeal. *Id.* There is no further appeal from that decision. *See* 8 C.F.R. §§ 341.6 and 103.3(a). Neither the INS nor the Office of Administrative Appeals could address Kevin's constitutional claims. *See* 8 U.S.C. § 1103; *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (administrative agencies lack jurisdiction to adjudicate the constitutionality of congressional enactments).

On August 19, 1998, the immigration judge ordered Kevin deported to Jamaica. (App. 22a.) Kevin appealed to the Board of Immigration Appeals ("BIA"), which dismissed Kevin's appeal on April 19, 1999. (App. 16a-21a.)

Kevin filed a petition for review of the BIA order in the United States Court of Appeals for the Seventh Circuit, claiming that he was a citizen under § 1432. Kevin met the requirements of § 1432(a)(4) and (a)(5) because he was under eighteen years of age and a lawful permanent resident of this country at the time of his father's naturalization. *Wedderburn*, 215 F.3d at 797 (App. 4a.) Subsections (a)(1) through (a)(3) lay out the circumstances under which naturalized parents can pass citizenship to their children. Generally speaking, these subsections envision that if both parents are present in the child's life, both must naturalize, but if one parent is out of the picture, then the naturalization of the remaining parent is sufficient.

Kevin contended that under subsection (a)(3) he became a citizen when his father naturalized, because his mother was indeed out of the picture and unavailable, and his father, who had legitimated Kevin and brought him to the United States, was his custodial parent. Thus, his father was the functional equivalent of a mother of an illegitimate child, whom § 1432(a)(3) allows to confer citizenship upon her child single-handedly. Kevin also contended that the subsection's requirement that parents be "legally separated" in order to transmit citizenship single-handedly should be read broadly to permit derivative citizenship where the parents had never married and the child was in the sole legal custody of the naturalizing parent. This reading is supported by the legislative history, which suggests that the legal separation requirement is an unintentional holdover from the days when a child could only be legitimated through the marriage of his parents; and by the statute's purpose, which the INS identified as the preservation of family unity and the avoidance of harsh results. Finally, Kevin argued that if the statute is given a purely literal reading, it discriminates unconstitutionally on the basis of gender and illegitimacy.

On June 1, 2000, the court of appeals dismissed Kevin's petition, including both his statutory and constitutional claims. The court held that Kevin was not a citizen under 8 U.S.C. § 1432 because Kevin's father was not -- and could never be -- "legally separated" from Kevin's mother. *Wedderburn*, 215 F.3d at 799 (App. 8a - 9a). The court did not address the fact that legitimation by means other than marriage has become increasingly common in the years since the statute was enacted, or the fact that, as a result, large numbers of legitimated children live in families with a single parent or (as here) a single parent and a step-parent. The court instead hypothesized that these families constituted only a "small subset" of naturalizing families, and so excluding them from the benefits of passing citizenship from parent to child was *de minimis*. *Id.* at 800 (App. 10a). In reaching this result, the court relied heavily on a parent's ability to obtain citizenship for his child "as a matter of right" under § 322, another provision of the Immigration and Nationality Act ("INA") (codified at 8 U.S.C. § 1433).[1] *Id.* at 800 (App. 10a).

Turning to Kevin's constitutional claims, the court held that § 1432 does not discriminate on the basis of gender despite its express language favoring the mothers of children born out of wedlock over the fathers of such children. The court first held that under *Miller v. Albright*, 523 U.S. 420 (1998), Kevin did not have standing to claim that § 1432(a)(3) discriminated against his father on the basis of gender.

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[1] The court's reliance on Fitzroy Wedderburn's ability to file a petition under 8 U.S.C. § 1433 is misplaced for two reasons: the grant of such a petition is discretionary, not "a matter of right," as the court described it; and the availability of less favorable alternate routes to citizenship is irrelevant to the issue of whether the distinctions drawn in § 1432 are unconstitutional. *See, e.g., Trimble v. Gordon*, 430 U.S. 762, 774 (1977) ("Hard cases cannot be avoided by a hypothetical reshuffling of the facts.").

Wedderburn, 215 F.3d at 801-02 (App. 11a - 12a). Even if Kevin could raise this claim, however, the court rejected it on the ground that Kevin's father was not similarly situated to the mother of an illegitimate child, because he had legitimated Kevin. *Id.* at 802 (App. 13a). Finally, the court noted that § 1432 discriminates in favor of illegitimate children, but applied no scrutiny to that distinction. *Id.* The court denied Kevin's petition for rehearing and suggestion for rehearing en banc on August 31, 2000. (App. 1a).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Seventh Circuit has held that 8 U.S.C. § 1432 does not discriminate unconstitutionally in conditioning citizenship for the child of a naturalized citizen upon the parent's gender, the child's illegitimacy, and the parent's marital status. These holdings conflict with the prior decisions of this Court, including *Miller v. Albright,* 523 U.S. 420 (1998), in which a majority of the Court applied heightened scrutiny to gender-based distinctions in 8 U.S.C. § 1409. That provision confers citizenship on out-of-wedlock children who have one native-born citizen parent. Section 1432, which similarly confers citizenship on the children of naturalized citizen parents, contains gender-based distinctions even harsher than those in § 1409, as well as legitimacy-based distinctions. It therefore is subject to the same analysis as § 1409. The Court's grant of certiorari in *Nguyen v. Immigration and Naturalization Service,* 208 F.3d 528 (5th Cir. 2000), *cert. granted,* 69 U.S.L.W. 3191 (Sept. 26, 2000), to address again the validity of § 1409, presents a timely opportunity for the Court to address the same issues in the context of § 1432, a parallel provision.

I. THIS CASE RAISES IMPORTANT QUESTIONS THAT ARE CURRENTLY PENDING BEFORE THE COURT IN ANOTHER CASE

A. Gender Discrimination in Citizenship Statutes

In *Miller v. Albright*, 523 U.S. 420 (1998), this Court reviewed the constitutionality of 8 U.S.C. § 1409, the provision governing the ability of native-born fathers to transmit citizenship to their children born out of wedlock. The plaintiff, Lorelyn Miller, challenged the validity of the statute's requirement that a citizen father of a child born out of wedlock abroad must establish his paternity of the child through a formal act prior to the child's 21st birthday, while citizen mothers of such children face no such requirement. The case was decided by a plurality and drew five separate opinions. In the short time since *Miller* was decided, courts have struggled with its proper application.[2]

Miller involves the overlap of two fundamental areas: the sharing of United States citizenship between a parent and his child, and the equal application of the law regardless of gender or other suspect classifications. Citizenship is "a most precious right," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963), that is valued especially highly by those like Fitzroy Wedderburn who have left their homes, worked hard, and waited long in order to attain it. No less important is the principle of equal protection under the law, a basic tenet of American society for more than a century. How these

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[2] *See, e.g., Lake v. Reno*, 226 F.3d 160 (2d Cir. 2000); *Nguyen v. Immigration and Naturalization Service*, 208 F.3d 528 (5th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3191 (Sept. 26, 2000); *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999); *petition for cert. filed*, 68 U.S.L.W. 3741 (May 22, 2000); *Terrell v. Immigration and Naturalization Service*, 157 F.3d 806 (10th Cir. 1998).

principles interact, in the context of the decades-old naturalization provisions of our immigration law, is a difficult issue that touches the lives of thousands of families each year. Affirming the continuing importance of this issue, the Court recently granted certiorari in *Nguyen v. Immigration and Naturalization Service*, 208 F.3d 528 (5th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3191 (Sept. 26, 2000), to address once again the constitutionality of § 1409.

Like § 1409, § 1432 is a provision of the Immigration and Nationality Act that governs the automatic transmission of citizenship between a citizen parent and his child. Section 1409 sets out the conditions under which a native-born citizen parent can pass citizenship to his child born out of wedlock, while § 1432 governs the ability of naturalized citizen parents to do the same. Like § 1409, § 1432 contains gender distinctions, treating fathers of children born out of wedlock differently from mothers simply on the basis of gender. In § 1409, these distinctions take the form of a requirement that a father recognize his paternity of the child during the child's minority in order to share his citizenship with his child, while a mother may share her citizenship without meeting any such requirement. *See* 8 U.S.C. § 1409(a); *cf.* 8 U.S.C. § 1401. In § 1432, the gender distinctions are contained in subsection (a)(3), which permits unwed mothers of children born out of wedlock to transmit citizenship to their children so long as the children have not been legitimated, but denies unwed fathers the right to transmit citizenship to their children under any circumstances, even if they have legitimated their children and assumed full responsibility for them.

The arguments raised in *Nguyen* and *Miller* that § 1409 unconstitutionally discriminates on the basis of gender -- arguments supported by a majority of the Court in *Miller*, *see* 523 U.S. at 476 (Breyer, J., dissenting) -- apply to § 1432 with even greater force. In § 1409, there is at least some mechanism by which an unwed citizen father can demonstrate his

connection to his child and thereby pass on his own citizenship, through legitimation, written acknowledgment, or a court adjudication of paternity before the child reaches eighteen years of age. By contrast, § 1432(a)(3) makes no provision at all for an unwed, naturalized father to transmit citizenship to his child, even if he acknowledges paternity, legally legitimates the child, and financially supports the child during the child's minority. Kevin Wedderburn's father did all these things, yet under the literal language of § 1432 Kevin still can never acquire citizenship through his father. Under § 1432(a)(3) as written, transmittal of citizenship from an unwed citizen father to his legitimated son or daughter is impossible in all circumstances. The analysis applied to the gender distinctions in § 1409 is applicable here.

In addition, this case, like *Nguyen*, raises the question of whether statutes conditioning citizenship on gender distinctions should be subjected to heightened scrutiny. A majority of the Court suggested in *Miller* that heightened scrutiny was appropriate, despite the deferential review this Court has sometimes accorded immigration and naturalization statutes. *See* 523 U.S. at 434 n.11 (plurality), 472 (Breyer, J., dissenting). No member of the Court voted to apply the more relaxed review of *Fiallo v. Bell,* 430 U.S. 787 (1977), and both Justice Stevens and Justice Breyer explicitly held that the *Fiallo* standard is inapplicable to claims of automatic citizenship for the children of United States citizens. *See* 523 U.S. at 429 (plurality), 477-78 (Breyer, J., dissenting). The courts of appeals facing the issue since then have generally applied heightened scrutiny. *See Lake v. Reno,* 226 F.3d 141, 148 (2d Cir. 2000); *Nguyen,* 208 F.3d at 534-35; *United States v. Ahumada-Aguilar,* 189 F.3d 1121, 1126 (9th Cir. 1999); *see also Breyer v. Meissner,* 214 F.3d 416, 424 (3d Cir. 2000) (applying heightened scrutiny to plaintiff's claim that a statute discriminated against his citizen mother in her ability to pass her citizenship to him). Nevertheless, the question of the correct standard of review for citizenship-conferring statutes

that discriminate based on gender is not free from doubt. Once again, the Court's answer in *Nguyen* to these questions will guide the resolution of this case as well.

B. Standing

In *Miller*, the Court was divided over whether the plaintiff child had standing to challenge the gender discrimination in § 1409, because the person most directly affected by that discrimination was her father, not the plaintiff herself. Justice O'Connor, joined by Justice Kennedy, voted to reject the plaintiff's claim on the ground that she lacked standing to raise it under the test for third-party standing set out in *Powers v. Ohio*, 499 U.S. 400, 411 (1991).[3] The remaining Justices, however, all found that Lorelyn Miller has standing to raise the gender discrimination claim. Justices Stevens and Rehnquist held that the plaintiff child's own claim was so intertwined with her father's claim that they should be considered together. 523 U.S. at 433. Justice Scalia, joined by Justice Thomas, stated that he, too, accepted petitioner's standing to bring this claim. 523 U.S. at 455 n.1 (Scalia, J., concurring). Finally, Justice Breyer, joined by Justices

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[3] In its response to the petition for certiorari in *Nguyen*, the government made much of the fact that *Nguyen* presented no standing issue because both the child and the father were plaintiffs. This position is at odds with the INS's objection on on the father's involvement in the case in the court of appeals, where the INS argued that a father had no right to have his constitutional challenge heard in the course of deportation proceedings against his child. *See Nguyen*, 208 F.3d at 534. Indeed, the legal basis on which the appeals court allowed Nguyen's father to intervene in the appeal is unclear. The general rule -- that outsiders to a deportation proceeding are not permitted to intervene in the appeal therefrom -- has been so uniformly followed that Fitzroy Wedderburn did not attempt to join in his son's appeal in this case.

Ginsberg and Souter, found that the plaintiff in fact met the *Powers* test, in that her father had been hindered from asserting his own claim when he was dismissed from the case by the district court. 523 U.S. at 473 (Breyer, J., dissenting).

Here, Fitzroy Wedderburn was hindered in asserting his own rights by the lack of any effective mechanism for doing so. The need for him to assert those rights was unknown until Kevin's application for citizenship was denied by the INS Office of Administrative Appeals on August 13, 1998. Kevin was ordered deported less than a week later, and there was no established procedure for Fitzroy to intervene in Kevin's deportation proceeding to assert his own constitutional rights.[4] In procedural and practical terms, Fitzroy was more hindered than Lorelyn Miller's father was from defending his constitutional rights. Thus, under *Miller*, Kevin Wedderburn has standing to raise his father's gender discrimination claim.

In deciding *Nguyen*, the Court will undoubtedly clarify many of the issues raised in *Miller* -- standing to bring a parent's gender discrimination claim, the proper standard of review for such a claim, and the outcome of that analysis. Section 1432, the INA provision at issue here, is a parallel provision to § 1409. Because the two provisions overlap so substantially, certiorari is warranted so that *Nguyen* and this case can be considered together.

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[4] *See supra* n. 3. In *Miller*, the father could and did join in the declaratory judgment action brought by his daughter, but was dismissed from the case. 523 U.S. at 426. The father did not participate in the appeal, presumably because the case had been transferred to the District of Columbia. *Id.* at 427.

II. THIS CASE ALSO RAISES AN IMPORTANT QUESTION OF WHETHER CITIZENSHIP MAY BE CONDITIONED ON A CHILD'S LEGITIMACY OR THE MARRIAGE OF HIS PARENTS.

Section 1432(a)(3) restricts a child's ability to obtain citizenship through a single naturalized parent based upon the child's legitimacy and the marital status of his parents. Under this Court's previous decisions, these legitimacy-related distinctions violate the Equal Protection clause of the Fifth Amendment unless they are substantially related to an important government goal. *See Clark v. Jeter,* 486 U.S. 456, 461 (1988). Although the court of appeals noted the legitimacy-based distinctions in § 1432(a)(3), it failed to examine them, effectively subjecting them to a standard of review less demanding than rational basis review -- no review at all. Because this Court has applied the same "intermediate" level of scrutiny to discrimination based on legitimacy as to discrimination based on gender, its treatment of the gender discrimination claims in *Nguyen* will shed considerable light on Kevin's claim of legitimacy-based discrimination in this case – an additional reason why the two cases should be considered together.

A. Section 1432(a)(3)'s Legitimacy-Related Distinctions and the Proper Standard of Review

Read literally, § 1432(a)(3) completely forecloses citizenship for legitimated children whose parents never married each other. Under the first clause of § 1432(a)(3), children in the custody of one parent may derive citizenship only if their parents are "legally separated." The court of appeals held that this phrase required the parents' previous marriage to each other, thus denying derivative citizenship through one naturalized parent to children whose parents never married each other, even when the non-custodial parent

is unavailable and the naturalized parent has taken full legal responsibility for the child. Under the court of appeals' interpretation, citizenship derived through one naturalized parent is generally unavailable to children whose parents have never married.

The only exception to this rule is that, under the second clause of § 1432(a)(3), a child who has not been legitimated may derive citizenship from his naturalized mother. The court of appeals noted that this provision gives illegitimate children "an extra route to citizenship, one not enjoyed by legitimate (or legitimated) offspring." *Wedderburn*, 215 F.3d at 802 (App. 14a). The court made no further comment on this anomalous provision, which creates a perverse incentive for fathers not to legitimate their children. Perhaps the court thought that a classification that benefitted illegitimate children, rather than putting them at a disadvantage, raised no equal protection problem. That belief, however, is contradicted by this Court's prior decisions. *See, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 (1982).

Although the court of appeals noted that § 1432(a)(3) discriminates against legitimated children whose parents have never married, it displayed no interest in this disparate treatment and applied no scrutiny to the distinctions drawn in the statute. Instead, the court condoned these distinctions, commenting cavalierly that Kevin's real problem was that his father "legitimated him on the cheap: by acknowledging his status as Kevin's parent rather then by marrying his mother." *Wedderburn*, 215 F.3d at 802 (App. 14a). This approach perpetuates old prejudices and conflicts with basic principles long established by this Court. Ironically, it also runs counter to the overall approach of the INA, which looks to the law of the child's or father's domicile in defining the "legitimation" acceptable under the statute, without requiring the parents' marriage. *See* 8 U.S.C. § 1101(c).

In a line of cases beginning with *Levy v. Louisiana,* 391 U.S. 68 (1968), over thirty years ago, this Court has condemned the government's unequal treatment of children born out of wedlock. In *Trimble v. Gordon,* 430 U.S. 762, 769-70 (1977), the Court struck down an Illinois probate law that, like § 1432(a)(3), denied a benefit to children simply because their parents had never married. (In *Trimble,* as in this case, the child's father had legally acknowledged his paternity, publicly held the child out as his, contributed financially to the child's support, and otherwise treated the child as his own, but had not married the child's mother.) The Court subjected the Illinois statute to scrutiny more exacting than the deferential "rational basis" standard, and concluded that, because the goals of the statute were poorly served by the discriminatory provision, the statute violated the equal protection clause. *Id.* at 767. More recently in *Clark v. Jeter,* 486 U.S. 456 (1988), the Court found unconstitutional a statute limiting the ability of illegitimate children to seek support from their fathers, when legitimate children faced no such limitation.

In *Clark v. Jeter,* the Court clarified that the standard of review applicable to distinctions based on legitimacy is the same standard that applies to gender-based distinctions: intermediate scrutiny, in which the statutory provision at issue must bear a substantial relationship to an important governmental goal. 486 U.S. at 462. If *Nguyen* confirms, as *Miller* and the cases interpreting it suggest, that the proper standard of review for gender-based distinctions in citizenship statutes is heightened scrutiny, then *Nguyen* will provide guidance how that level of scrutiny should operate here. Although the statute at issue in *Nguyen* does not draw these particular legitimacy-based distinctions, the analysis in *Nguyen* is likely to suggest that the legitimacy-based discrimination in § 1432(a)(3) merits more scrutiny than it received in the court of appeals' decision here.

B. Widespread Changes in the Law of Legitimation

The approach of the court of appeals is even more troubling because the trend toward treating children equally under the law regardless of their legitimacy or the means of their legitimation has only expanded since *Trimble* and *Jeter* were decided. In addition to this country, over 30 countries around the world now permit fathers to legitimate their children without marrying the children's mothers, and accord children legitimated in this way the same legal rights as children born to married parents.[5] The INA itself looks to the law of the father's or child's domicile in setting the requirements for "legitimation" under the statute -- an approach that recognizes a child's legitimation even if the applicable law does not make the parents' marriage a condition for legitimation. *See* 8 U.S.C. § 1101(c). Moreover, the analogous § 1409 expresses no preference for legitimation by marriage over legitimation by any other means. Finally, newly enacted legislation, providing automatic citizenship for children of native-born *and* naturalized parents, contains no requirement that the parents of legitimated children must have been married.[6]

The "legal separation" language of § 1432(a)(3), which was last revised in 1940, likely reflects the old presumption

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[5] These countries include the 26 member states of the European Convention on Human Rights, Jamaica, several Latin American countries, and the People's Republic of China. *See* N. Johnson, *Recent Developments: The Breadth of Family Law Review Under the European Convention on Human Rights,* 36 HARV. INT'L L.J. 513 (1995); Comment, *The Effects of Intercountry Adoptions on Biological Parents' Rights,* 22 LOYOLA L. A. INT'L & COMP. L. REV. 251 (1999).

[6] *See* Section III below for the text of the new statute.

that a child's legitimation would necessarily encompass the marriage of his parents. The court of appeals endorsed this old view in its description of legitimation without the parents' marriage as legitimation "on the cheap." This approach conflicts with the large and growing body of law permitting legitimation without marriage, and also creates a conflict between different provisions of the INA. A parent who has fully complied with his country's requirements for legitimating his child risks finding out too late that he can never share United States citizenship with that child because he never married the child's other parent. Perversely, the statute also discourages a father's responsible act of legitimating his child, rewarding children who have not been legitimated with "an extra route to citizenship" through a single mother. *Wedderburn,* 215 F.3d at 802 (App. 14a).

The statute's goal of ameliorating harshness and promoting family unity for naturalizing families -- the purpose identified by the government for § 1432 -- is ill-served by its distinctions drawn on the basis of legitimacy and parental marriage. The statute's discriminatory treatment of children born to parents who have not married each other, condoned by a court of appeals that failed to engage in even cursory review, merits this Court's attention in order to prevent further confusion over the applicable standard of review and appropriate analysis.

III. A REMEDY FOR THE STATUTE'S DEFECTS IS AVAILABLE.

If the Court finds the distinctions drawn in § 1432(a)(3) unconstitutional, the simple elimination of the discriminatory language from the statute will provide Kevin with a remedy. The INA expressly provides for the excision of unconstitutional provisions in § 406, which states that "[i]f any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act . . .

shall not be affected thereby." Eliminating the discriminatory language produces a new version of § 1432(a)(3) requiring only "[t]he naturalization of the parent having legal custody of the child." Because Fitzroy had legal custody of Kevin at the time that he naturalized, Kevin can derive citizenship from his father under a constitutional version of the statute.[7]

When a court determines that a provision of a statute violates Equal Protection, it may remedy that violation by striking the offending portions if Congress would likely prefer their excision to other alternatives. *Califano v. Westcott,* 443 U.S. 76, 89-93 (1979); *Welsh v. United States,* 398 U.S. 333, 361 (1970). Here, Congress has provided a clear statement as to its preferences in its recent enactment of amendments to § 1432. Those amendments repeal § 1432 entirely and substitute in its place a new provision, 8 U.S.C. § 1431, which provides:

> (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
>
> > (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

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[7] The court of appeals expressed some doubt whether Kevin was in the legal custody of his father Fitzroy at the relevant times. In this, the court was mistaken. Kevin's mother relinquished legal custody of Kevin to Fitzroy in 1982. (App. 31a.) And, under prior immigration decisions, Fitzroy is presumed to have had legal custody of Kevin as of 1986, when he legitimated Kevin. *See Matter of Rivers,* 17 I & N Dec. 419, 422 (BIA 1980). Because Fitzroy's custody of Kevin was never removed or legally transferred to anyone else, Kevin remained in Fitzroy's legal custody when Fitzroy naturalized.

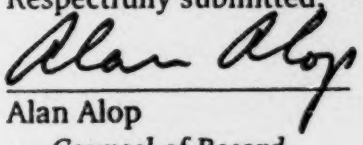
> (2) The child is under the age of eighteen years.
>
> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

Child Citizenship Act of 2000, Pub. L. No. 106-395; 114 Stat. 1631) to be codified at 8 U.S.C. § 1431(a) (signed by the President on October 30, 2000). The new statute eliminates all of the discriminatory language that served as an obstacle to Kevin's claim of citizenship. While the new statute does not apply to Kevin -- the acquisition of citizenship status is generally governed by the statute in effect at the time such acquisition occurred, *see* C. Gordon, S. Mailman, & S. Yale-Loehr, *Immigration Law and Procedure*, § 98.03(2) (1999) -- it clearly demonstrates that Congress would not object to the excision of § 1432(a)(3)'s discriminatory portions, which would yield a result almost identical to the new statute.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold this petition until it can remand the case for consideration in light of its decision in *Nguyen*.

Respectfully submitted,



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